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CRIMINAL LAW ISSUE

STATE v. DAVIS, 53A05-0109-CR-404, ___ N.E.2d ___ (Ind. Ct. App. May 15, 2002).
NAJAM, J.

Prior to trial, Davis moved to suppress the evidence found in his apartment, arguing that the search warrant was invalid because Officer Jeffers failed to record the warrant conversation with Judge Bridges. While Officer Jeffers' "test" recording was on the audiotape, his subsequent conversation with the judge had, for unknown reasons, not been recorded. Following a hearing, the trial court granted Davis' motion to suppress, finding, in part:

> Whether by telephone or by affidavit, warrants are procured through strict procedural safeguards that provide the appropriate level of Fourth Amendment protection to defendants. Although Indiana courts have seen fit to relax other procedural safeguards in the Telephonic Warrant [Statute], the requirement that an audio recording be made is an absolute necessity to insure that an adequate Fourth Amendment protection is afforded a defendant against whom a telephonic warrant issued.

As a result, the court dismissed the charges against Davis, without prejudice. . . .

. . . .

[O]fficer Jeffers attempted to record the telephone conversation [footnote omitted] with Judge Bridges, but the machine inexplicably failed to record it. The State, thus, cannot demonstrate whether (1) Officer Jeffers recited and verified the facts under penalty of perjury, (2) read to the judge from the warrant form, or (3) whether the judge directed Officer Jeffers to modify the warrant, all of which are explicit statutory requirements. See Ind. Code § 35-33-5-8(b). Further, because there was no tape recording, the court reporter here could not transcribe the conversation and the judge could not certify the audiotape and the transcription for entry into the record, all of which are, again, explicit statutory requirements. See I.C. § 35-33-5-8(d). As a result, the court reporter could not notify Officer Jeffers when the transcription was entered into the record, and, thus, Officer Jeffers could not fulfill his obligation to affix his signature to that transcription. See I.C. § 35-33-5-8(f). In fact, the only evidence here that a telephonic search warrant was ever executed is the paper warrant and Officer Jeffers' testimony at the suppression hearing. That evidence does not begin to satisfy the requirements of the warrant statute.

In Cutter we declined to elevate form over substance and, instead, upheld a telephonic search warrant where (1) it was taped by the applicant not by the judge, (2) the applicant was not sworn, (3) the officers did not sign the transcript of the telephone call, and (4) the judge did not comply with the certification procedures. But there, the procedural deficiencies were excusable because the warrant conversation was actually recorded and the sufficiency of the warrant was, thus, capable of independent verification. That is not the case here, where, in addition to procedural irregularities, there is no actual recorded conversation.

This case is more akin to Timmons v. State, 723 N.E.2d 916, 920 (Ind. Ct. App. 2000), aff'd in part, rev'd in part on rehearing by 734 N.E.2d 1084 (Ind. Ct. App.) (Timmons II), trans. denied, where we declared a telephonic search warrant invalid because the only statutory requirements that were satisfied were the officer's testimony under oath and the actual recording of the conversation. Indeed, the officer there did not read from a warrant form, the judge never advised the officer to affix her signature to the warrant, no warrant was actually ever issued, and neither the judge nor the officer certified the audio tape or transcription. Id. at 920. When, in addition to numerous procedural defects, the warrant conversation is not recorded, as in this case, the result is a near total failure to comply with the procedures set out in the statute. See id. The warrant in this case is more appropriately characterized as nonexistent. Id.

The State argues alternatively that even if the warrant did not satisfy the statutory requirements, the evidence obtained from Davis' residence should not be suppressed because Officer Jeffers' actions fall within the "good-faith exception" to the exclusionary rule. Again, we must disagree.

. . . .

[W]ithout the audiotape, which is the centerpiece of the statute, neither the trial court nor this court can verify whether the warrant was properly issued or whether the search was executed in objective good faith reliance on the warrant. Thus, we agree with the trial court's finding that an audio recording "is an absolute necessity." We would have to disregard not only the statute but also the right to meaningful judicial review of whether the warrant was properly issued to hold that the "good-faith exception" saves the evidence gathered from Davis' residence. . . .

. . . .

BAILEY and ROBB, JJ., concurred.

CIVIL LAW ISSUES

CORR v. AM. FAMILY INS. CO., No. 71S03-0107-CV-336, ___ N.E.2d ___ (Ind. May 8, 2002).

BOEHM, J.

We hold that a vehicle is an "underinsured motor vehicle" pursuant to Indiana Code section 27-7-5-4(b) if the amount actually available for payment to the insured from the tortfeasor's bodily injury liability policies is less than the policy limits of the insured's underinsured motorist coverage.

. . . On June 9, 1997, fifteen-year-old Janel Lacee Corr died from injuries sustained the previous day in a one-car accident on the Indiana Toll Road in LaPorte County. Janel was a passenger in a minivan driven by Andres Balderas that left the roadway, then slid and overturned when Balderas attempted to bring it back onto the road. Four other occupants of the van were seriously injured in the crash. The owner of the van, Balderas'

father, had an automobile insurance policy with bodily injury liability limits of $100,000 per person and $300,000 per accident. Balderas' mother had a separate auto policy from a different insurer, but with the same limits. Each of these two insurance companies tendered $300,000—its per accident limit—to the trial court and the two filed an action to determine the proper allocation of that fund among the several claimants. Following mediation, the parties to that lawsuit agreed that Janel's parents, who were divorced, would each receive $57,500. These amounts were paid and the insurers on the two Balderas policies are not involved in this litigation.

Janel's father, James T. Corr, had purchased his auto insurance from American Family Insurance ("AFI"). That policy provided underinsured motorist ("UIM") coverage of $250,000 per person and $500,000 per accident. At some point before the accident, Corr had asked his insurance agent, Glenn Shultz, how they could reduce Corr's premiums. Shultz lowered the UIM policy limits to $100,000 per person and $300,000 per accident, allegedly without Corr's approval, and those limits were in effect at the time of the accident. AFI denied Corr's claim for Janel's death under his UIM coverage, contending that the Balderas van was not "underinsured."

Corr sued AFI, seeking a declaratory judgment that (1) Janel was an insured under his policy, and (2) his UIM coverage was $250,000 per person and $500,000 per accident rather than $100,000 and $300,000 respectively. Janel's mother, Pamela A. Corr, had a separate policy with $100,000 and $300,000 limits, also from AFI and also including UIM coverage. AFI moved to join Pamela as a plaintiff, and that was done by agreement.

. . . .

Indiana Code section 27-7-5-4(b) states:

> For the purpose of this chapter, the term underinsured motor vehicle, subject to the terms and conditions of such coverage, includes an insured motor vehicle where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits for the insured's underinsured motorist coverage at the time of the accident, but does not include an uninsured motor vehicle as defined in subsection (a).

Ind. Code § 27-7-5-4(b) (1998).

AFI contends this statutory language requires a comparison of the $600,000 per accident bodily injury liability limits provided by the two Balderas policies to the $300,000 per accident UIM limit under either James' or Pamela's policy. Under this comparison, AFI contends the van was not underinsured because the aggregate limits of Balderas' bodily injury liability coverage exceeded the limit of either James or Pamela Corr's UIM coverage. This contention is phrased in terms of the per accident limits, not the per person limits. For support, AFI relies on Allstate Ins. Co. v. Sanders, 644 N.E.2d 884, 886-87 (Ind. Ct. App. 1994), where the court held that if more than one person is injured in an accident, the tortfeasor's per accident liability limit controls for purposes of determining whether a vehicle is "underinsured." In that case both injured parties were insured by the same UIM policy. Id. at 885. Under those circumstances the per accident limits may have been relevant. Here, however, Janel was the only injured party insured under the Corrs' UIM policies. Indiana Code section 27-7-5-5(c) states that the maximum amount payable for bodily injury under UIM coverage is the lesser of (1) the difference between the amount paid in damages to the insured by the tortfeasor and the "per person limit" of UIM coverage held by the insured, and (2) the difference between the total amount of damages incurred by the insured and the amount paid by the tortfeasor. Accordingly, if a limits-to-limits comparison is to be employed, where only one insured is injured in an accident, the appropriate limits to

compare to determine if a vehicle is underinsured are the per person limit of the tortfeasor's liability policy and the per person limit of the insured's UIM coverage.

The mediation resolved that Balderas' mother's policy operated in this circumstance as an excess policy over the father's policy. The aggregate per person coverage under the two Balderas policies is therefore $200,000. The per person limit under Pamela's UIM coverage is $100,000. The per person limit under James' UIM coverage is disputed. James claims the amount is $250,000, and AFI contends it is $100,000. The amount actually recovered by the two Corrs was $57,500 each, or a total of $115,000. The issue is whether we are to compare the Balderas policy limits ($200,000) or the amount recovered ($57,500) to the amount of each Corr's UIM coverage.

AFI relies on Sanders, 644 N.E.2d at 887, where the Court of Appeals, relying on Colorado case law interpreting Colorado's UIM statute, held a policy limits to policy limits comparison was mandated in Indiana. The Corrs contend, and the Court of Appeals in the Shultz case agreed, that under the Indiana statute the proper comparison is between the amount of each Corr's UIM coverage and the amount of the coverage limits actually "available for payment" to each Corr from Balderas' coverage. Under that comparison, the Corrs argue, the van is underinsured because the amount available for payment to each Corr ($57,500) is less than the limit of each Corr's UIM coverage ($100,000 for Pamela, and either $100,000 or $250,000 for James). Although neither side's view of the statute is problem-free, for the reasons that follow we agree with the Corrs.

As Judge Kirsch writing for the Court of Appeals in the Shultz case pointed out, the Colorado statute interpreted in Leetz v. Amica Mut. Ins. Co., 839 P.2d 511 (Colo. Ct. App. 1992), and relied upon by Sanders, is not the same as Indiana's UIM statute. 743 N.E.2d at 1198. . . . The Indiana statue turns om the amount of the "coverage limits available for payment to the insured" not the overall coverage limits of the policy. Indiana's UIM statute does not express this clear preference for limits-to-limits comparison. Instead it uses the phrase "available for payment to the insured" to describe the coverage limits to which it is referring. That term, though not as clear as it might be, has some judicial history. The Ohio UIM statute uses language identical to Indiana's statute. [Footnote omitted.] In Motorists Mut. Ins. Co. v. Andrews, 604 N.E.2d 142, 145 (Ohio 1992), the Supreme Court of Ohio held that where the claims of multiple parties had resulted in a "reduction of the amount available for payment to the insured below the underinsured motorist limits," the statute required "a comparison between the amount actually available for payment to an insured and the policy limits of the insured's underinsured motorist coverage." That holding was recently reaffirmed in Clark v. Scarpelli, 744 N.E.2d 719, 726-27 (Ohio 2001), in which the court noted that the holding of Andrews had survived subsequent changes to the Ohio statute. [Footnote omitted.]

. . . "Available" ordinarily means "present or ready for immediate use." Merriam Webster's Collegiate Dictionary 79 (10th ed. 1993). Thus, "available for payment to the insured," when describing coverage limits, is money present or ready for immediate use by the insured, not amounts potentially accessible. Under this view, the amount "available" is the $57,500 each Corr actually recovered, not the $200,000 theoretically available from Balderas. Moreover, if the term "available for payment" did not achieve this result, it would apparently be wholly surplusage, contrary to standard principles of statutory construction. [Citations omitted.]

Our holding today is also congruent with the underlying purpose of UIM coverage, which broadly stated is to give the insured the recovery he or she would have received if the underinsured motorist had maintained an adequate policy of liability insurance. [Citation omitted.] . . . Although we agree with AFI that a full-recovery statute will not necessarily assure full indemnification for all potential damage to all potential insureds, we do not read the statute as narrowly as AFI does. As the Court of Appeals pointed out in Shultz, the interpretation AFI advances "leads to the anomalous result that when multiple

people are injured in an accident, an injured party is in a better position if the driver responsible for the accident is not insured at all than if he or she has insurance." 743 N.E.2d at 1197. Here, if Balderas had no insurance, the Corrs' uninsured motorist coverage would have applied and they each could have filed a claim up to the limits of that coverage. Because Balderas was covered, however, AFI argues the Corrs' recovery is limited to a total of $115,000. This is inconsistent with the view of the statute as a full-recovery, remedial measure.

We recognize that the view we take of the statute creates it own anomalies. If, as here, there are multiple claimants they may reduce the "amount available" to any single claimant below the minimum UIM coverage even if the limits if applied to only one claimant would be adequate. We conclude that the legislature has chosen to look to "available" amounts, and accordingly accept this anomaly as less problematic than leaving the victim of an underinsured motorist worse off than the victim of a wholly uninsured motorist.

Finally, AFI argues the language of its policy dictates a limits-to-limits comparison. [Footnote omitted.] If so, the policy provides less coverage than the statute requires. We agree with the Court of Appeals in the Shultz case that although parties may contract to limit liability, insurers may not offer less coverage than the law requires. 743 N.E.2d at 1199. Thus, although the phrase "subject to the terms and conditions of such coverage" in section 27-7-5-4(b) allows parties to contract for more coverage than the law requires, it does not allow them to contract for less. [Citation omitted.] To the extent the Corrs' policies provide less coverage than required by Indiana law, the law mandates that the coverage be expanded to the statutory requirement.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER and SULLIVAN, JJ., concurred.

STATE v. TRUEBLOOD, No. 45A04-0106-CV-253, ___ N.E.2d ___ (Ind. Ct. App. May 15, 2002).

KIRSCH, J.

The Medical Licensing Board of Indiana ("Board") and the State of Indiana (collectively "the State") bring this consolidated interlocutory appeal following the trial court's issuance of two stay orders, one that stayed the Board's decision to suspend the medical license of Simon Trueblood, M.D., and the other that stayed the Board's subsequent decision to revoke Trueblood's medical license. The State raises five issues; however, we find dispositive one of Trueblood's issues: whether a trial court's stay of an order of an administrative agency constitutes a preliminary injunction entitling a party to an interlocutory appeal as a matter of right under Ind. Appellate Rule 14(A)(5).

We conclude that it does not; therefore, we dismiss.

. . . .

ROBB and SULLIVAN, JJ., concurred.

DOWNEY v. MUFFLEY, No. 50A03-0106-CV-197, ___ N.E.2d ___ (Ind. Ct. App. May 15, 2002).

KIRSCH, J.

[M]other appeals that portion of the order incorporating the Marshall Superior Court's standard parenting guideline that prohibits the presence of an unrelated adult member of the same sex from spending the night with the parent while in the presence of the children if that person is involved in a homosexual relationship with the parent. She raises two issues for our review, one of which we find dispositive: whether the trial court has the authority under Indiana law to prohibit a custodial parent from living with a domestic partner as part of the court's local standard parenting guideline when there has been no finding of harm to the children. [Footnote omitted.]

. . . .

The court further ordered the parties to abide by its order of March 27, 2000 whereby the Marshall Superior Court No. 1 adopted standard parenting time guidelines, which included the following restriction that prevents Mother from living with a same-sex domestic partner while she has physical custody of the children:

> 2. **PARENTAL LIVING ARRANGEMENTS**. Neither parent shall allow an unrelated adult member of the opposite sex, or of the same sex if they are involved in a homosexual relationship with that parent, to spend overnight with them while a child is in their care.

Id. at 12.

Mother now appeals this portion of the trial court's order that prohibits her from cohabitating with a same-sex partner while living with her children.

. . . .

In *D.H. v. J.H.*, the court was confronted with the question of whether the homosexual activity of a mother required a custody award of the children to the father. In a case of first impression, the court provided the following guideline: "[W]e believe the proper rule to be that homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child." 418 N.E.2d at 293. . . .

. . . .

[T]he *Teegarden* [*v. Teegarden*, 642 N.E.2d 1007, 1008 (Ind. Ct. App. 1994)] court stated:

> . . . [T]he trial court found specifically that Mother's homosexuality did not have an adverse effect on I. and S. Furthermore, the trial court found that 'neither boy currently appears to be particularly traumatized by their mother's sexual orientation,' R. at 209, despite the fact they had seen Mother kissing and hugging her partner.
>
> Had the evidence revealed that Mother flagrantly engaged in untoward sexual behavior in the boys' presence, the trial court may have been justified in finding her to be unfit and, accordingly, awarded custody to Stepmother. However, *without evidence of behavior having an adverse effect upon the children, we find the trial court had no basis upon which to condition Mother's custody of her sons*. We therefore find the trial court abused its discretion, and reverse that portion of the custody order which imposes conditions upon the award of custody to Mother.

Id. at 1010

. . . .

In *Pennington* [*v. Pennington*, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992), *trans. denied*)], the father and mother divorced and agreed that mother could have custody of their son. Based upon the father's homosexuality, the trial court imposed an overnight visitation restriction that prohibited his partner from being present during the visitation. The trial court determined that the presence of the same-sex partner "would be injurious to the minor child's emotional development." [Citation omitted.] . . .

. . . We subsequently concluded that the trial court made a specific finding that the presence of the same-sex partner would injure the child's emotional development. A review of the record revealed a rational basis for the restriction, and therefore a panel of this court concluded that the trial court did not abuse its discretion in imposing the restriction. [Citation omitted.]

The court in *Marlow*, 702 N.E.2d at 736, also found a rational basis supporting the trial court's visitation restrictions upon the father based upon his homosexuality. In particular, the trial court ordered that father "not have any other non-blood related person in the house overnight when the children" were visiting. *Id*. at 735. The trial court also ordered that the father "not include in the children's activities during periods of visitation, any social,

religious or educational functions sponsored by or which otherwise promote the homosexual lifestyle." *Id*.

In reviewing the record, we noted that the father took the children to a day-long conference that focused on the concerns of homosexuals, to a lesbian choir, and to a baptismal service where the minister "came out as a gay man." [Citation omitted.] Following visits with their father, the children displayed emotional distress, which included nightmares, bedwetting, and general malaise. A psychologist opined that the father's in-depth conversations with the children concerning his homosexuality were inappropriate because the children lacked the cognitive ability to understand. Finally, a family counselor explained that the children were confused about their father's new lifestyle and recommended sole custody be awarded to the mother with the father being restricted from having overnight visitation with the children. . . .

In the present case, the record before us reveals no rational basis for supporting the overnight restriction. We first note that the Marshall Superior Court entered a standing order on March 27, 2002 that adopted the Indiana Parenting Time Guidelines, which are effective in all visitation orders. In addition to adopting these state guidelines, the court also adopted additions to the guidelines. The addition complained of here prohibits both parents from allowing "an unrelated adult member of the opposite sex, or of the same sex if they are involved in a homosexual relationship with that parent, to spend overnight with them while a child is in their care." [Citation to Brief omitted.] This standard restriction is imposed upon parents as a routine matter and is not dependent upon a finding of harm to the children, endangerment to the children's current or future emotional well-being and upbringing, or any adverse effect upon the children whatsoever. Rather, the restriction is automatically imposed. Such routine imposition of the overnight visitation restriction runs counter to IC 31-17-4-2, which provides in pertinent part that: "the court shall not restrict a parent's visitation rights unless the court finds that the visitation might endanger the child's physical health or significantly impair the child's emotional development."

Here, a review of the record before us on appeal reveals that there was no evidence of any adverse effect upon the children based upon Mother's sexual preference and relationship with a same-sex partner. Nanette Fredericks, a licensed clinical social worker who completed a custody evaluation for the family, testified that the children were "happy, healthy, well-adjusted, [and] bright." *Transcript* at 147. She testified that the children "are probably the happiest, well adjusted children that I've ever seen walk through my door." *Id*. at 153. She also testified that both parties were "exceptional parents in relation to other evaluations" regardless of Mother's sexual preference. [Citation to Transcript omitted.] In fact, she stated that Mother's homosexuality did not play a major role in the evaluation: . . . .

. . . .

We hold that imposing the standard overnight restriction without a finding of harm to or adverse effect upon the children is an abuse of the trial court's discretion. The trial court erred by a priori imposing the restriction upon Mother without the requisite finding of harm. Imposition of such restriction can be justified only when it is based upon a finding of harm to the children on a *case-by-case basis*. Visitation and custody determinations must be determined with respect to the best interests of the children, not the sexual preferences of the parents.

. . . .

ROBB and SULLIVAN, JJ., concurred.

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